Supreme Court, U.S.
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No. ____

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In the

Supreme Court of the United States

October Term, 1998

CITY OF SOUTHFIELD, Michigan;
Nick Banda; and Katherine Peacock,

Petitioners,

-v-

ROOSEVELT REESE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER UNDER *ST. MARY'S HONOR CENTER v. HICKS*, IF PLAINTIFF ESTABLISHES THAT THE DEFENDANT'S PROFFERED REASON FOR THE CHALLENGED ACTION IS FALSE, BUT THE DISTRICT COURT FINDS NO EVIDENCE OF INTENTIONAL DISCRIMINATION, SUMMARY JUDGMENT FOR DEFENDANT IS PRECLUDED?

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The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in Appendix at 1a-15a. The decision of the United States District Court for the Eastern District of Michigan is contained in Appendix at 16a-27a which is the transcript of hearing of Motion for Summary Judgment.

JURISDICTION

On May 30, 1997, the United States District Court for the Eastern District of Michigan granted summary judgment in favor of Petitioners. Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On August 13, 1998, the United States Court of Appeals for the Sixth Circuit reversed the District Court's grant of summary judgment to Petitioners.

This Court has jurisdiction to review this case under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 U.S.C. §1981:

All persons within the jurisdiction of the United States shall have the same right in every state or territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, suggests, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

42 U.S.C. §1985:

(3) Depriving Persons of Rights or Privileges.

If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for president or vice president, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in the person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such

> injury or deprivation against any one or more of the conspirators.

Michigan's Civil Rights Act, M.C.L. 37.2202(1)(a); M.S.A. 3.548(202)(1)(a) provides in relevant part:

(1) An employer shall not do any of the following:

> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term or condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

STATEMENT OF THE CASE

This case arises out of an inquiry Respondent (Plaintiff) made about the operation of a day care center at a property he was considering for purchase. The subject property was located at17385 West Ten Mile Road in the City of Southfield, Michigan. Plaintiff, Roosevelt Reese, an African-American, testified in his deposition that in April of 1992, he went to the Planning Department of the City of Southfield to make his inquiry. The clerk at the desk referred him to Petitioner Katherine Peacock, a Planner at the Planning Department. Ms. Peacock immediately summoned Defendant Nick Banda, the City Planner, and the three of them held a brief informal discussion. At this meeting, Plaintiff told them that he wanted to develop the property at 17385 West Ten Mile Road as a day care center. Another meeting was scheduled a week later. In attendance at the second meeting were the Plaintiff, his daughter Linda Mathis, Nick Banda and Katherine Peacock. At this

meeting, Plaintiff indicated that Mr. Banda and Ms. Peacock told him that the property he intended to develop as day care center did not have adequate parking and that it would be necessary for him to acquire the adjacent lot, demolish the structure on it and make a parking lot. Plaintiff was informed by Mr. Banda that federal and city grant money might be available to him to demolish the structure. Plaintiff claimed he made unsuccessful attempts to purchase the adjacent property from the owner, Mr. Goula. He was then allegedly told by Mr. Banda that the City of Southfield would not allow a day care center at that location "under any circumstances unless Plaintiff purchased adjacent vacant lot."

Thereafter, Plaintiff decided not to continue with his efforts to open a day care center at that location. Plaintiff, who had already entered into a land contract for the purchase of the subject property, invoked a contingency clause in the contract. The contingency was that Plaintiff did not have to go through with the purchase of the property if he was unable to obtain city approval for operation of a day care center at the location. **Plaintiff admitted that he neither asked for nor submitted to the Planning Department a site plan approval application for the subject property. He also admitted that he never submitted to the Department a site plan.**

Ms. Peacock testified in her deposition that she made a site inspection after Plaintiff inquired about opening a day care center at the subject property. She informed Plaintiff that there were different parking requirements for office than for day care center, and that he would have to do a site plan to determine how many spaces he needed to have for the day care center. Ms. Peacock expressed concern that there would not be enough parking on the site for the day care center. She therefore advised Plaintiff that it might be a good idea to purchase the adjacent property so that he would

have parking to meet the needs of the day care. Plaintiff told her that he did not want to acquire the adjacent property.

Ms. Peacock stated that only prospective developers who asked for a site plan approval application were given one. She indicated that very often people come to the Planning Department to discuss their ideas with the planners without any interest in submitting a formal site plan approval application and paying the fee. **The Planning Department did not consider every inquiry as tantamount to an application for site plan review**. Ms. Peacock stated that inquiries made by African-Americans are treated the same way as all other inquiries. She testified that in 1990 she processed an application for a day care center by an African-American. That application was ultimately approved. Ms. Peacock indicated that where a person making an inquiry about the property use or an applicant has a disagreement about any requirements, the person could submit his plan anyway. The Planning Department could not refuse to accept an application for site plan review.

Petitioner Nick Banda testified in his deposition that in order to legally apply for a site plan approval, a prospective developer must submit to the Planning Department a site plan approval application. Describing the procedure for obtaining an application, Mr. Banda stated that the applicants "just come up and merely request it" from the staff at the counter. He had nothing in his records indicating the receipt of an application from Plaintiff. Mr. Banda testified that he merely "encouraged" **all inquirers** about the subject property, **including the current occupant**, to purchase the adjacent property. It was not mandatory.

In her deposition, Helen Harper, Plaintiff's real estate agent, testified that Plaintiff prematurely abandoned his efforts to get approval for a day care center at the subject

property. She knew that **the ultimate decision whether to approve or to disapprove the day care center project did not rest with Mr. Banda**. Accordingly, she advised Plaintiff that he could take the matter to either the Planning Commission or the Zoning Board of Appeals but Plaintiff refused.

Subsequently, Ms. Sabir opened a day care center at the property in question. Like Mr. Reese, Ms. Sabir was told by Mr. Banda that it was necessary to acquire the adjoining parcel to provide for additional parking. When Ms. Sabir tried unsuccessfully to acquire the adjoining parcel, she hired a professional architect who prepared and submitted a site plan approval application to the Planning Department. The application was approved.

Plaintiff filed this lawsuit claiming that he was discriminated against on the basis of his race in that he, as an African-American, was treated differently than was Ms. Sabir, who is not African-American. The different treatment alleged is that Ms. Sabir was allowed to run a day care center in that location and that the Plaintiff was not. Based on these allegations, the Plaintiff asserted claims of deprivation of his constitutional rights under 42 U.S.C. §1981, §1983, and §1985. In addition, Plaintiff asserted claims of violation of his civil rights under Michigan's Elliott-Larsen Civil Rights Act (ELCRA) and the Michigan Constitution.

On March 17, 1997, Petitioners (Defendants) filed a Motion for Summary Judgment on all claims arguing that Plaintiff has failed to present any evidence of intentional discrimination or disparate treatment based on his race. Plaintiff filed a Response on April 10, 1997. Defendants then filed a Reply on April 16, 1997.

On April 22, 1997, a hearing was held on the Defendants' Motion for Summary Judgment. The District Court granted the Defendants' Motion finding that Plaintiff failed to present facts in support of his claim of intentional discrimination or disparate treatment based on his race. The Court concluded:

> There simply is no evidence in this record that Mr. Banda or Ms. Peacock treated Mr. Reese differently because of his race. The only facts we have are that Mr. Reese is African-American, Sabir is Caucasian. Mr. Reese didn't develop the parcel, and Ms. Sabir did. And that is not enough to show that the reason why Mr. Reese never developed that parcel was because of his race.
>
> The Plaintiff has a much bigger burden than that. The Plaintiff must produce some evidence from which a jury can determine by a preponderance of the evidence that the reason why Mr. Reese was treated the way he was because he is black, and there simply is no evidence in this Court's opinion to support it. There is no evidence that a non-black was treated differently or would have been treated differently by Mr. Banda, that is, a non-black who came there and expressed an intent to develop that parcel for a day care center. (Appendix at p. 26a).

The Respondent appealed to the United States Court of Appeals for the Sixth Circuit.

On August 13, 1998, the Court of Appeals reversed the District Court's Judgment. The Court of Appeals held

that the Defendants' legitimate non-discriminatory explanation, i.e. Reese never filed an application, was false. Therefore, Reese was entitled to present his full case to a trier of fact. (Appendix at p. 9a-10a).

REASONS FOR GRANTING THE WRIT

I.THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO CLARIFY WHETHER OR NOT A PLAINTIFF SATISFIES HIS BURDEN OF DEFEATING A MOTION FOR SUMMARY JUDGMENT BY MERELY ESTABLISHING THAT THE DEFENDANT'S PROFFERED REASON FOR THE CHALLENGED ACTION IS FALSE DESPITE A FINDING BY THE DISTRICT COURT THAT THERE WAS NO EVIDENCE OF INTENTIONAL DISCRIMINATION.

Although the Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502; 113 S.Ct. 2742; 125 L.Ed.2d 407 (1993) only addressed the plaintiff's burden of proving intentional discrimination at trial, the Courts have attempted to extrapolate from *Hicks* the burden the plaintiff must bear to survive defendant's motion for summary judgment. The *Hicks* decision has caused a divergence of views among the circuits regarding the legal standard that a plaintiff must satisfy at the summary judgment stage.[1]

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[1] See Jody H. Odell, Comment: Between Pretext Only and Pretext Plus: Understanding *St. Mary's Honor Society v. Hicks* and its Application to Summary Judgment, 69 Notre Dame L. Rev. 1251 (1994) ("when applied to moitons for summary judgment, Hicks has produced two contending standards within the lower federal courts") ; Debroah C. Malamud, the Last Minuet; Disparate Treatment After *Hicks*, 93 Mich. L. Rev. 2229 (1995) ("the circuits have not come to agreement on this issue and the Supreme Court will inevitably need to resolve it").

After *Hicks*, a majority of circuits like the Sixth Circuit in the instant case, have held that once a plaintiff has established a prima facie case and has put on sufficient evidence to allow a factfinder to disbelieve the defendant's proffered reason for its actions, that alone is enough to preclude the entry of summary judgment as a matter of law for defendant. (pretext only jurisdictions). In declaring this to be the law of the circuit, the Eleventh Circuit in *Combs v. Meadowcraft Inc.*, 106 F.3d 1519 (11th Cir. 1997) identified other circuits that adhere to its view:

> Eight other circuits have considered the issue and interpreted *Hicks* to mean exactly what we have interpreted it to mean -- that evidence sufficient to discredit a defendant's proffered non-discriminatory reasons for its actions, taken together with the plaintiff's prima facie case, is sufficient to support (but not require) a finding of discrimination. That is the law not only in this circuit, but also in the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits. See, e.g., . . . *Michell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (considering two questions at summary judgment: (1) the prima facie case and (2) "whether the plaintiff has shown that there is a genuine dispute of material fact about the defendant's proffered explanation for the discharge"); . . . *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("if a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate because it is for the trier of fact

> to decide which story is to be believed") . . .
> 106 F.3d at 1535-1536.

In contrast, a minority of the Circuits, including the First, Second and Fifth Circuits have required that the plaintiff demonstrate both that the defendant's proffered reasons are false and that the real reasons were discriminatory. (pretext plus jurisdictions). *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993); *Bodenheimer v. PPG Ind. Inc.*, 5 F.3d 955 (5th Cir. 1993).

In *LeBlanc*, *supra*, the First Circuit articulated the standard to defeat a defendant's motion for summary judgment in the context of age discrimination suit. The Court stated that the proper standard for summary judgment after *Hicks* required not only "minimally sufficient evidence of pretext," but evidence that overall reasonably supports a finding of discriminatory animus. *Id.* at 843. The Court in *LeBlanc* stated:

> The *Hicks* decision emanated from an appeal from a full bench trial. In the context of a summary judgment proceeding, *Hicks* requires that, once the employer has advanced a legitimate, non-discriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age. Direct or indirect evidence of discriminatory motive may do, but the evidence as a whole must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age

> animus. Thus, the plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer. *LeBlanc*, 6 F.3d at 843.

The Circuits who have adopted the "pretext only" standard have relied on the following dicta from *Hicks*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is required." *Hicks*, 113 S.Ct. at 2749.

However, the above passage read together with the remainder of the *Hicks* Opinion does not show that a disbelief of defendant's proffered reasons will always be sufficient to preclude a summary judgment for defendant. The Court in *Isenbergh v. Knight-Ridder Newspaper Sales Inc.*, 97 F.3d 436 (11th Cir. 1996) recognized the fallacy in the argument that the above passage from *Hicks* shows that defendant will never be entitled to judgment as a matter of law if the evidence is sufficient to cause a disbelief of the defendant's proffered reasons. The Court stated:

> Despite the *Hicks* language quoted above, we have no confidence that the *Hicks* decision

> dictates to circuit and district judges, or even was intended to suggest, that every time the evidentiary record in a case could support a jury's disbelief of the employer's explanation for the pertinent employment action, no court may grant a motion for judgment as a matter of law to the employer (or grant to an employer summary judgment) in an employment discrimination case. In our view, *Hicks*, taken as a whole, more likely supports a different conclusion . . . *Isenbergh*, 97 F.3d at 442.

Petitioners believe that the passage from *Hicks* is nothing more than a recognition that in certain circumstances, proof of a prima facie case plus disbelief of the defendant's proffered reasons for the challenged action may support an inference of discrimination. But the Court emphasized that in those circumstances, the factfinder must still determine whether the evidence established discrimination. As the ***Hicks*** Court noted:

> Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, **there must be a finding of discrimination.** (Emphasis in original). *Hicks*, 113 S.Ct. at 2749 n.4.

In further support of Petitioners' position that disbelief of the defendant's proffered reason is not enough to avoid summary judgment, the *Hicks* Court stated:

> Nothing in law will permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination,

> the much different (and much lesser) finding that the employer's explanation of its action was not believable. *Id.* at 2751.

In view of the fact that the *Hicks* Court expressly rejected the requirement of additional evidence to establish discrimination, Petitioners submit that the proper standard for summary judgment consistent with *Hicks*, should be that the plaintiff's evidence establishing prima facie case and pretext must also create a triable issue of discrimination before plaintiff survives summary judgment.

The Michigan Supreme Court in *Lytle v. Malady* (On Rehearing), 458 Mich. 153; 579 N.W.2d 906 (1998) applying *Hicks* adopted a similar standard for summary judgment:

> . . . [D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition [summary judgment] only if such proof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. In other words, plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for age or sex discrimination. Therefore, we find that, in the context of summary [judgment], a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude, that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. *Lytle*, 458 Mich. at 175-176.

The First Circuit similarly held in *Udo v. Tomes*, 54 F.3d 9 (1st Cir. 1995) that in order to survive a motion for summary judgment, the plaintiff must introduce sufficient evidence to support two findings: (1) that the defendant's articulated reason for the challenged action is a pretext, and (2) that the true reason is discriminatory. The Court noted that while the plaintiff may rely on the same evidence to prove both pretext and discrimination, the evidence must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by discriminatory animus. *Id.*

Thus, under *Hicks*, if the evidence introduced by the plaintiff regarding a prima facie case and pretext is insufficient to raise a triable issue that discriminatory animus was a motivating factor in the defendant's decision, defendant is entitled to summary judgment.

II.THE COURT OF APPEALS ERRED IN REVERSING SUMMARY JUDGMENT FOR PETITIONERS WHERE THE DISTRICT COURT MADE A FINDING THAT THERE WAS NO INTENTIONAL DISCRIMINATION.

The Court of Appeals for the Sixth Circuit correctly stated that under the *McDonnell-Douglas* scheme, a §1981 plaintiff must first establish a prima facie case of discrimination by showing that (1) it is a member of, or associated with, a racial minority; (2) it attempted to contract, or sought "the benefit of the laws . . . enjoyed by white citizens"; (3) it was qualified to do so; and (4) the

contract or benefit was still available after the plaintiff was turned away. *Chauhan v. M. Alfieri Co., Inc.*, 897 F.2d 123, 127 (3rd Cir. 1990).

Petitioners do not disagree with the Court of Appeals' conclusion that Respondent made this minimal showing of prima facie case. However, the Court of Appeals misapplied the law in holding that because it rejected Petitioners' proffered reason for the challenged action, summary judgment for the Petitioners was inappropriate. The Court of Appeals' exclusive focus on the incredibility of the defendant's proffered reason for the challenged action runs counter to the *Hicks* mandate that there must be a finding of discrimination. As the Court in *Hicks* stated:

> The ultimate question is discrimination ***vel non***. Once the defendant responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide not (as the dissent would have it) whether that evidence is credible, but whether the rejection was discriminatory . . .
>
> * * *
>
> Once the defendant has responded to the plaintiff's prima facie case, the district court has before it all the evidence it needs to decide not (as the evidence would have it) whether defendant's response is credible, but whether the defendant intentionally discriminated against the plaintiff. *Hicks*, 113 S.Ct. at 2753-2754.

Moreover, Defendants' burden of articulating a

legitimate non-discriminatory reason for the challenged action was one of production not persuasion. Thus, Defendants clearly satisfied their burden of production "whether ultimately persuasive or not". Further, the *Hicks* Court pointed out that the determination that the defendant has met its burden of production and has thus rebutted any legal presumption of intentional discrimination did not involve any credibility assessment.

The Plaintiff was required to prove not merely a pretext, but a pretext for discrimination. According to *Hicks*, a "reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." *Hicks*, 113 S.Ct. at 2752. Thus, the Court of Appeals' rejection of Defendants' proffered reason for the challenged action could not relieve the Plaintiff of the burden of producing evidence sufficient for the jury to conclude that the Defendants' action was motivated by a discriminatory animus. Since the District Court found that there was no intentional discrimination and the Court of Appeals made no determination that such finding was clearly erroneous, the Court of Appeals should have allowed the summary judgment in favor of Defendants to stand.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the decision of the Sixth Circuit be reversed.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

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Dated: October 22, 1998

United States Court of Appeals, Sixth Circuit.

Aug. 13, 1998.

Roosevelt REESE, Plaintiff-Appellant,
v.
CITY OF SOUTHFIELD, Michigan; Nick Banda; and Katherine Peacock, Defendants-Appellees.

No. 97-1670.

On Appeal from the United States District Court for the Eastern District of Michigan.

Before NELSON, BOGGS, and CLAY, Circuit Judges.
PER CURIAM.

This case involves the application of the burden-shifting proof scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) , to discrimination claims brought under 42 U.S.C. § § 1981, 1983, and 1985, and under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2302. The district court granted the defendants' summary judgment motion on the ground that plaintiff Roosevelt Reese failed to adduce direct evidence that he was the victim of race discrimination in connection with his efforts to obtain municipal approval for a day care center he planned to build in Southfield, Michigan.

We hold that the evidence proffered by Reese at the summary-judgment stage was sufficient to satisfy his burden under the McDonnell Douglas standard, and we therefore reverse the judgment of the district court and remand for further proceedings.

I

Reese, who is black, is a developer of Detroit-area day care centers. In April 1992, Reese made an offer to purchase a piece of property located at 17385 West Ten Mile Road in Southfield, Michigan. The offer was accepted, and on April 28, 1992, Reese signed a real estate contract thatwas conditioned on obtaining approval from the City of Southfield for Reese to use the property as a day care center. At about the time that Reese was negotiating for the purchase of the property at issue, his real estate agent, Helen Harper (who is white), went to the Southfield City Planning Department to seek approval for Reese's proposed conversion of the property (which was already zoned for business use) to use as a day care center. In an affidavit submitted in connection with this case, Harper stated that she "spoke to [defendant] Nick Banda [of the city planning department], who informed me that Mr. Reese would have to purchase the vacant lot next to the property before the city would approve the day care center." Banda's stated reason was that "more parking spaces were needed for a day care center," and that "a day care center [would] not be permitted under any circumstances unless the adjoining vacant lot was purchased for use as a parking lot." Harper did not believe Banda because, as a licensed realtor, she states that she knew the 12 parking spaces on the property Reese proposed to purchase were sufficient to satisfy the requirements of the local zoning code.

Reese himself proceeded to make inquiries at the planning department. Reese first visited the planning department in person in April 1992; he "went to the counter and told" the attendant that he wanted to operate a day care center at the property in Southfield. The attendant did not provide any forms to Reese or otherwise instruct him on the procedure for obtaining the required approval. Instead, the attendant

told Reese that he would have to speak to defendant Catherine Peacock, a supervisor in the department. Peacock, in turn, said that Reese would have to speak to Banda, who was her supervisor. Despite the fact that both Peacock and Banda were in the office at that moment, they required Reese to schedule a formal meeting with them about a week later. Although site plan applications supposedly are routinely handed out by the clerk on duty at the Planning Department, neither the attendant, Peacock, nor Banda gave Reese the required site plan application form. The defendants' asserted reason for not giving a site plan application to Reese is that Reese did not specifically request an application by name.

Reese came back about a week later (shortly after April 28th, when Reese signed the contingent contract to purchase the property at issue) for the formal meeting with Peacock and Banda. This meeting included Reese, his daughter Linda Mathis (whom Reese intended to install as director of the proposed day care center), and Peacock and Banda. At this meeting, according to Reese's deposition testimony, Peacock and Banda "suggested [that he] buy the property next door, tear down the abandoned building, and make a parking lot." They did not advise him to file a site plan application, however, nor did they provide him with a copy of such an application.

After this meeting, Peacock visited the property and conducted a site inspection. To Reese's chagrin, however, Banda continued to insist that he purchase the adjacent property, demolish the building, and build additional parking spaces. At one point, Banda told Reese that federal funds might be available to finance this enterprise. Later, Banda told Reese that, in fact, no federal funds were available. [FN1] While Reese was not opposed to acquiring the adjacent property in principle, he was unwilling to bear the expense himself. No further progress was made toward

approval of Reese's proposed day care center, according to real estate agent Harper, "Mr. Banda was adamant about not letting Mr. Reese open a day care center at that location." When Harper informed Banda that Reese could not be legally required to purchase the adjacent property and that Reese would "take the matter to the City Planning Commission for approval," Banda repliedthat he "will do everything in [his] power to stop you." Throughout these negotiations, Banda's sole stated reason for requiring Reese to purchase the adjacent property was the necessity for more parking spaces at any proposed day care center on the property at issue. In the end, after trying to work with Banda and Peacock for ten months, Reese abandoned his plan to operate a day care center at that location.

Sometime in 1995, Reese was driving down Ten Mile Road in Southfield and saw that Sabir's Sunshine Day Care Center was open for business on the property where he had hoped to start his own day care center. Reese noted that, while the adjacent building had been torn down, no parking facilities had been constructed and the adjacent lot was simply sitting vacant. Upon discovering that the owners of the Sunshine Day Care Center were not black, Reese began to suspect a racial motivation behind the behavior of Banda and Peacock. He therefore filed this lawsuit.

II

On March 25, 1996, Reese filed a complaint against Banda, Peacock, and the City of Southfield in the United States District Court for the Eastern District of Michigan. Banda and Peacock were named in both their individual and official capacities. The complaint alleged violations of 42 U.S.C. § § 1981 and 1985, a Fourteenth Amendment violation brought pursuant to 42 U.S.C. § 1983; violations of Michigan's

Elliott-Larsen Civil Rights Act and the Michigan constitution; and state-law claims of tortious interference with business relationships.

After an apparently acrimonious exchange of discovery requests and responses, the defendants moved for summary judgment on March 17, 1997. They argued principally that (1) Reese had failed to adduce sufficient evidence to state a claim of intentional discrimination under any legal theory (primarily because, since Reese had never submitted a formal site plan application, the city had not rejected his application on racial or any other grounds); (2) Reese's claim that the defendants had violated 42 U.S.C. § 1985 was barred by the intra- corporate conspiracy doctrine; and (3) Banda and Peacock were entitled to qualified immunity. Reese responded that (1) summary judgment was inappropriate because the defendants had not satisfied their discovery obligations; (2) under the burden-shifting analysis of McDonnell Douglas, he had adduced sufficient evidence to state a prima facie case of race discrimination against the defendants, and the defendants had failed to provide adequate evidence of a non-pretextual reason why he had not been given a site plan application; and (3) Banda and Peacock were not entitled to immunityunder either federal or state law.

On April 22, 1997, the district court held a hearing on the defendants' summary judgment motion. The transcript of the hearing makes clear that the district court was troubled by Reese's failure to introduce any direct evidence that Sabir was treated differently or more favorably than Reese. For instance, one of the court's first questions was "Do you have any information that you've gathered in any way, shape or form with respect to how the party that ultimately developed [the day care center site] was treated?" Adverting to the

McDonnell Douglas burden-shifting scheme, Reese's attorney replied that "I don't know what they told Sabir, but I do know what the results were. I mean, I know that they made my man spin his wheels for many months and they greased the skids for Ms. Sabir." The following exchange then took place:

THE COURT: But you have to prove that he was treated differently, don't you?
MR. ROBERTSON: He was treated differently because the results were different.
THE COURT: Well, that's not enough. Obviously, the results could be different for a lot of reasons.
MR. ROBERTSON: But they couldn't articulate any reason why he was treated differently, Your Honor.
THE COURT: My point is, how do you know he was treated differently? ...

(Emphasis added.) At the conclusion of the hearing, the court ruled from the bench in favor of the defendants. The court gave this explanation of its ruling:

There simply is no evidence in this record that Mr. Banda or Ms. Peacock treated Mr. Reese differently because of his race. The only facts we have are that Mr. Reese is African American, Sabir is Caucasian. Mr. Reese didn't develop the parcel, and Ms. Sabir did. And that is not enough to show that the reason why Mr. Reese never developed that parcel was because of his race.

The plaintiff has a much bigger burden than that. The plaintiff must produce some evidence from which a jury can determine by a preponderance of the evidence that the reason why Mr. Reese was treated the way he was was because he's black, and there simply is no evidence in this

Court's opinion to support it. There is no evidence that a non-black was treated differently or would have been treated differently by Mr. Banda, that is, a non-black who came there and expressed an intent to develop that parcel for a day care center.

Following entry of the district court's judgment, Reese filed a timely notice of appeal.

III

A

Though originally developed for use in the Title VII context, the Supreme Court has held that the burden-shifting proof scheme first adopted in McDonnell Douglas applies to lawsuits brought pursuant to 42 U.S.C. § § 1981 and 1985. See Patterson v. McLean Credit Union, 491 U.S. 164, 186, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (legislatively superseded in some respects by the Civil Rights Act of 1991). McDonnell Douglas also is generally regarded as applicable to Fourteenth Amendment claims brought pursuant to 42 U.S.C. § 1983. See, e.g., Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir.1997) ; McMillian v.. Svetanoff, 878 F.2d 186, 189 (7th Cir.1989) ; Senigaur v. Beaumont Ind. Sch. Dist., 760 F.Supp. 1200, 1205 (E.D.Tex.1991) . An identical burden-shifting scheme is applicable under Michigan's Elliott-Larsen Civil Rights Act. See Clark v. K-Mart Corp., 197 Mich.App. 541, 495 N.W.2d 820, 822 (Mich.App.1992)

.

McDonnell Douglas and its progeny reflect the fact that direct evidence is often unavailable in discrimination cases. Unlike a typical tort plaintiff, who has a fair idea that he has been wronged if he slips on a negligently maintained sidewalk or is struck by a car running through a red light, a discrimination plaintiff cannot necessarily offer direct testimony that his rejection, demotion, termination, or denial

was due to unlawful discrimination. McDonnell Douglas thus serves a discovery-like function: as long as a plaintiff can establish a prima facie case (as described below), the defendant is required to provide an explanation of its actions, be they rejection of an application, termination of employment, or any other covered act. The key difference between the McDonnell Douglas proof scheme and the burden of proof applicable in ordinary tort cases is that, in the discrimination context, a defendant cannot simply rest on the pleadings once the plaintiff has proffered evidence sufficient to state a prima facie case. Instead, the defendant is required to come forward with evidence of its own explaining its actions, even though the plaintiff's prima facie burden does not include introducing direct evidence of discrimination.

Courts translating the McDonnell Douglas scheme into a context like that presented in this case have explained the scheme this way:

Under this framework, a § 1981 plaintiff must first establish a prima facie case of discrimination by showing that 1) it is a member of, or associated with, a racial minority; 2) it attempted to contract, or sought "the benefit of [the] laws ... enjoyed by white citizens"; 3) it was qualified to do so; and 4) the contract or benefit was still available after the plaintiff was turned away. See Chauhan v. M. Alfieri Co., Inc., 897 F.2d 123, 127 (3d Cir.1990) . Once the prima facie case is established, the defendant must respond with a legitimate, nondiscriminatory reason for its actions. Id. When the defendant has satisfied that requirement, the burden shifts back to the plaintiff to prove that the defendant's reason is a pretext for discrimination.

Bd. of Managers of Glen Mills Schools v. West Chester Sch.

Dist., 838 F.Supp. 1035, 1042 (E.D.Pa.1993) , aff'd in relevant part, 52 F.3d 313 (3d Cir.1995) . Giving Reese the benefit of all favorable inferences, we are convinced that he has stated a prima facie case of discrimination under this proof scheme, even though we agree with the district court that the record is devoid of any direct evidence of discrimination. Reese is black, thereby satisfying the first element of the prima facie case. He at least arguably "sought the benefit of the laws" by requesting municipal approval of his plan to operate a day care center in Southfield, Michigan. Despite ten months of interaction with Reese, the city did not even give Reese a copy of the required application form, and yet a non-black applicant later was able to complete the entire approval process in six weeks. Moreover, Reese testified that he had experience developing other day care centers in the Detroit area, thus indicating that he was "qualified" for purposes of the burden-shifting analysis. Clearly, this is not direct evidence of race discrimination, but we hold that it satisfies the requirements of McDonnell Douglas.

Though not specifically so denominated, the defendants have attempted to provide a nondiscriminatory explanation for their failure to approve Reese's proposal for a day care center: he never filed a formal site plan application. The reason Reese never filed such an application, however, is that the city never gave him one. While the city correctly states that Reese never requested a site plan application by name, the record contains evidence that Reese requested "the procedures of opening a day care center in the City of Southfield." See J.A. at 230; see also id. at 82 ("I asked what were the procedures, and the young lady put me in contact with Ms. Peacock. At the time she didn't give me the papers."); id. at 85 ("Q. You never submitted a site plan to the City of Southfield, did you? A. I submitted what they

asked. Mr. Banda asked me to make a drawing, a sketch of existing and proposal of the building. I went to the building, made the drawings, measured, put the drawings in an envelope, took them and dropped them off at his clerical office, the employment office. Q. Isn't it true that you never submitted a site plan to the City of Southfield? A. I never got to that point. I went along with how they got--how the planning department guided me along, how they guided me. I went along with the direction that they guided me."). In short, it is not a "legitimate, nondiscriminatory explanation" to say that Reese never filed a site plan application, when his theory of discrimination is that the city discriminated against him by failing to provide the application in the first place, despite his repeated requests for the necessary information.

The defendants similarly cannot rely on the proposition that Sabir, like Reese, was "encouraged" by city planning officials to obtain additional parking spaces before operating the site at issue as a day care center. For one thing, Reese has submitted evidence that he was told additional parking was an absolute prerequisite to his operation of a day care center, while Banda testified that he merely "suggested" to Sabir that she obtain additional parking spaces. Moreover, Reese proffered evidence showing that no mention was made of parking spaces in Sabir's building permit, zoning approval, or other local regulatory documents. Because the defendants have provided no other legitimate, nondiscriminatory explanation for why Reese was not given an application when Sabir was able to obtain one with relative ease, Reese is entitled to present his full case to a trier of fact. [FN2]

B

The defendants assert that they cannot be held liable for violating 42 U.S.C. § 1985 because of the intra-corporate conspiracy doctrine, under which employees of a corporation or governmental entity generally cannot be deemed to

conspire with their corporate or governmental employer. See generally Hull v. Cuyahoga Valley Joint Vocational Sch. Dist., 926 F.2d 505, 509 (6th Cir.1991) . However, we have held that employees acting outside the scope of their employment relationship are not covered by the intra-corporate conspiracy doctrine. See, e.g., Johnson v. Hills & Dales General Hosp., 40 F.3d 837, 841 (6th Cir.1994) . A jury certainly could find that Banda and Peacock were acting outside the scope of their employment if they committed acts of intentional race discrimination as alleged in Reese's complaint. See, e.g., Ierardi v. Sisco, 119 F.3d 183, 186 (2d Cir.1997) (intentional sex discrimination outside scope of defendant's employment); Walker v. Crigler, 976 F.2d 900, 904 n. 3 (4th Cir.1992) (to same effect). [FN3] Accordingly, the intra-corporate conspiracy doctrine does not provide a basis for dismissing Reese's claim under 42 U.S.C. § 1985 at the summary-judgment stage.

C

As the defendants correctly argue, the Supreme Court has held that municipalities may not be held liable for the torts of their employees merely on a respondeat superior theory. See Monell v. New York City Dep't of Social Svcs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) . Under Monell, a municipality may only be held liable for the torts of its employees where those torts were committed pursuant to the municipality's custom or policy. See Monell, 436 U.S. at 694. Here, the defendants assert that "the Plaintiff did not identify any policy which caused his injury." Viewing the record in the light most favorable to Reese, however, we cannot say that Southfield had no custom or policy that supported the alleged discriminatory actions of Banda and Peacock. While the defendants argue (without contradiction) that they do not have a "policy in favor of racial discrimination," we do not believe that an affirmative policy in favor of

discrimination is required to sustain municipal liability for the discriminatory acts of municipal employees. If the municipality knowingly permits its employees to discriminate on impermissible grounds, that may be sufficient. Cf. Faragher v. City of Boca Raton,-- U.S.--, --- U.S. ----, at ----, 118 S.Ct. 2275, 141 L.Ed.2d 662, 1998 WL 336322, at *19 (June 26, 1998) . Moreover, the record shows that the defendants provided incomplete and at times evasive responses to Reese's discovery requests relevant to the "custom or policy" inquiry--for example, the number of race discrimination suits previously filed against the city. In the absence of this information, which the city is in a better position to obtain than Reese and which Reese properly requested during discovery, it would be unfair to say that there is no dispute as to an alleged custom or policy furthering discrimination in Southfield municipal agencies. For all these reasons, it is for the trier of fact to determine, on a complete trial record, whether the City of Southfield may be held liable for the discriminatory acts of Banda and Peacock, if any, consistent with the rule set forth in Monell.

D

Public officials exercising discretionary functions are immune from personal liability if a reasonable official in their position could have believed that the act that is the basis of the lawsuit did not violate clearly established law at the time. See Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) . [FN4] Harlow 's qualified-immunity doctrine does not dispose of Reese's claims against Banda and Peacock for two reasons. First, Banda and Peacock have been sued both in their official capacity and in their personal capacity, qualified immunity does not extend to officials sued in their official capacities. See Hafer v. Melo, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) . Second, indulging all inferences in favor ofReese and thus assuming

that Banda and Peacock intentionally tried to keep Reese's day care center out of Southfield for racial reasons, their actions would have violated clearly established law. See, e.g., Smith v. Lomax, 45 F.3d 402, 407 (11th Cir.1995) ("Given the clear state of the law prohibiting racial discrimination in public employment at the time the Board voted to replace Smith, no reasonable commissioner, with the information possessed by Lomax and Hightower, would have believed that his or her discriminatory actions were constitutional.") (internal footnote omitted). Therefore, qualified immunity also does not extend to Reese's claims against Banda and Peacock in their individual capacities.

E

Finally, Reese asserted two counts of tortious interference with business relationships in his complaint. The district court made no findings relating to these claims, and the parties have not argued the matter on appeal. Reese is free to pursue these claims on remand or not, as he chooses.

IV

For the foregoing reasons, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

Footnotes

FN1. We find Reese's testimony in this regard particularly interesting in light of Banda's later affidavit that, after Reese withdrew his offer for the proposed day care center property, "such [federal] grant monies were in fact used to fund the demolition of that [adjacent] structure."
In late 1993 or early 1994, a woman named Danacz Sabir (who is not black) approached the city planning department about developing the property at issue for use as a day care center. While Sabir "was strongly encouraged ... to consider

acquisition of the adjacent property" according to Banda's deposition testimony, she was not required to do so. Apparently, Sabir's application for site plan approval was approved within six weeks of her visit to the Planning Department. There is no direct evidence as to how Sabir was treated by Banda, Peacock, or other city employees in connection with her request for site plan approval.

FN2. In so holding, we express no opinion as to the actual merits of Reese's case. There are numerous examples of cases in which actions of local governments perceived by plaintiffs to be instances of discrimination actually turned out to be explained by simple incompetence. See, e.g., Williams v. City of Taylor, No. 95-2221, 1997 WL 720394 (6th Cir. Nov.10, 1997) . We merely hold that, given the state of the record in this case, the question of what really happened to Reese must be resolved by the trier of fact.

FN3. We emphasize that this, too, is a fact question to be passed upon by the trier of fact. To summarize, if a jury were to find that Banda or Peacock engaged in intentional discrimination against Reese, the jury would be presented with a binary choice: did Banda and/or Peacock act outside the scope of their employment, or did they act pursuant to a municipal policy or custom? If they acted pursuant to a municipal policy or custom (an issue discussed below), then they were acting within the scope of their employment, meaning both that they could not be held liable under 42 U.S.C. § 1985 and that (as explained below) the City of Southfield could be held liable for their violations of the primary civil-rights claims at issue. If they acted outside the scope of their employment, then a jury could find that Banda and Peacock conspired to violate Reese's civil rights. In any event, for the reasons discussed in Section III C, infra, the city cannot be held liable on Reese's Section 1985 claim.

FN4. The Michigan Supreme Court adopted the Harlow analysis in Guider v. Smith, 431 Mich. 559, 431 N.W.2d 810 (Mich.1988) .

United States District Court
for the District of Michigan
No.

Roosevelt REESE, Plaintiff
v.
CITY OF SOUTHFIELD, Michigan; Nick Banda; and Katherine Peacock, Defendants.

Date: 4/22/97

THE COURT: You've got to have facts. I have to know, I have to be aware of an issue of fact. In other words, some facts that you're offering to this jury from which they could conclude —— not on speculation, okay, but based on the evidence, by a preponderance of the evidence that the treatment of Mr. Reese was based on his race, and I haven't seen those facts that you're going to present.

All I have are the facts as to how he treated Mr. Reese. I don't have facts that Banda would have treated a non-black differently and you certainly don't have the smoking gun in which Banda, you know, obviously doesn't like blacks Or whatever, you don't have that.

MR. ROBERTSON: No, that's not even

—— THE COURT: I understand that, You have to pretty much show it on disparate treatment. You've got to show different treatment. I don't see where you have it.

MR. ROBERTSON Your Honor, we requested by way at interrogatories and production documentation, certain documentation or records from the City of Southfield, which we did not receive.

THE COURT: What would they show; how would that establish your case? what records did you precisely ask f or that would be relevant?

MR. ROBERTSON: Records of claims and lawsuits.

THE COURT: How would that be relevant to whathappened in this case?

MR. ROBERTSON: It would be relevant in establishing or demonstrating what the actual, although unwritten, policy of the City of Southfield planning department is.

THE COURT: Regardless of what the policy is, the Issue here is did Banda discriminate. He's the culprit, quote, unquote, here. He's the one that did whatever was done, basically. He's the one that all your pleadings allege treated Reese differently.

MR. ROBERTSON: It's not just Banda.

THE COURT: Who else?

MR. ROBERTSON: He the principal

—— THE COURT: Who --

MR. ROBERTSON Mrs. Peacock

THE COURT: All right. We'll put Peacock there, too. But they're the two people -— I don't care what the policy is in the City, because you don't have any evidence

that they were following some racial policy of the City. You still have to show me that Banda and/or Peacock treated non— blacks differently. And I don't see where you've got it.

MR. ROBERTSON: Judge, if there is an abuse of governmental power. arguendo, Banda was in a position to exercise certain power over this department, I think that's pretty well agreed upon. If in the exercise of this power, he abused what he was supposed to do, I'm certain that the City of Southfield didn't have a clandestine meeting with all the city council people, and say, "Hey, let's do that," that's not it. They sort of let things run by Banda. But they did - ~ the City of Southfield did sort of allow him to operate as a loose cannon without having to answer to anybody about exercising this governmental power.

This is under color of -- this is a governmental operation that he's going to. Reese had no way of knowing what to expect when he went in there except fair treatment. He had no way of knowing. He didn't even understand it until he was satisfied that he was treated fairly until a year later when he saw this place without the parking lot. He was thrown a red herring, Your Honor, and he took it and left. They establish the policies as to what happens when you walk in the place —— THE COURT What evidence do you have of that?

What evidence do you have that there's any policy in Southfield to treat blacks, potential applicants in the planning department differently than a white applicant?

MR. ROBERTSON: Both Reese and his daughter walked in there to open up a business, ask what they should do and they were not afforded the process that Banda says is available to everybody that walks in there. Banda says that when you walk in the place, if you ask about something, ask about opening a business, they'll give you an application. That's what he said in his deposition. But that's not what he did to Mr. Reese and to his daughter, he didn't do that.

THE COURT: well, I think there's more to it than that. I think Mr. Reese came in to talk to him about the —

MR. ROBERTSON: No, sir.

THE COURT: There was conversation about developing the day care center. Reese didn't walk in and say, "I want a site plan application."

MR. ROBERTSON; No, he did not walk in and say that, but that's what Banda is contending Reese had an obligation to do, to walk in and say, before you do anything, you've got to say the magic words, "I want a site plan application." Reese walked in and said, "I want to open a day care center, what do I do?" He got shoveled around to three different people. But Banda, in his deposition, says that when somebody comes in and inquires about the process, they'll shoot him an application.

THE COURT! Well, I don't think that's what he said, in this sense. Mr. Reese came in and didn't walk up to a counter and say, "You know, I want to develop this thing with the site plan, what do I do?" He came in and said, "I want to open a day care center," and he identified the parcel," and once the planner is aware of that, the planner, I

suppose, could have said, "Here, take an application." Or. which isn't unreasonable, the planner could have said, "Well, let me tell you now, Mr. Reese, with respect to that parcel, it has inadequate parking. And you're going to need to get the parcel next door." And he could do that and I'm assuming

— I'm assuming, I don't know, that Banda could do that on a very legitimate basis. He would have said it to any person who came in and said they want to put a day care center on that spot. He wouldn't have said, "Well, here's an application." Rather he would have said to them, "That is deficient and you are going to need the additional lot for parking."

MR. ROBERTSON: But, Judge, if you're going to assume that Mr. Banda would have said such—and—such, rather than something else, that's a factual issue.

THE COURT: You've got to show me some evidence that he wouldn't, You've got the burden to show that he would have said something different to a non—black. You've got that burden. I know you believe that Mr. Reese wasn't treated fairly, and I don't know whether he was or he wasn't, But there is still a lawsuit here, and your burden is to prove that he was treated differently.

I've gone through all these depositions, gone trough all that, and I'm thinking, "How can you prove he was treated differently?" You can show that he wasn't treated like maybe he wanted to be treated. And you can show that he maybe should have been told that he needs an application and given an application, but how do we know that if a non-black had approached with the same thing, he wouldn't have been treated exactly the same.

I mean, it's one thing for someone to walk up and say, you know, "I want to develop a site plan, what do I need?" It's something else for someone to walk into a planning department and say, "I want to develop this particular site." I think most planning departments or planners would say, if they thought there was a problem —-for example, a person comes in and says, "I want to come in and I want to put a gas station on this corner." Now, yes, the planners say. "Look, here's an application." Or the planner can say, "sir, you can't put a gas station on that corner. That's a residential corner. That's an office building corner, You can't even do it." And I don't think the planner would be acting improperly by not handing the person the application and letting him go out the door. I think the planner would be acting properly in telling them his professional opinion.

Now, the person may say, "Well, I understand that it may not be presently zoned for a gas station, but I can get a waiver or whatever, and I want to pursue it," that's fine, but I don't know that once an individual says to a planner what he or she wants to do with the property and the planner then indicates to them the planner's concern about the property, I don't think there's anything necessarily improper about that.

And as I say, now it would be improper if Sabir walked in there and said, "I want to develop this as a day care center," and Banda said, "Perfect site for a day care center. Here's the application." Now we have different treatment, But I don't have that.

MR. ROBERTSON; But if you processed the application start to finish in six weeks while they danced

Reese around for almost a year, seems like the same thing to me, Your Honor.

THE COURT: Anything else?

MR. ROBERTSON: Nothing further, Your Honor.

THE COURT: Mr. Clark?

MR. CLARK: Just briefly, your Honor. The only evidence that there is about how Ms. Sabir was treated was from Banda in his affidavit which is included with the briefs saying that he encouraged her like he did Mr. Reese to purchase the property next door. She appeared with her attorney shortly thereafter and the process went forward. She asked for an application, she was given one. The plaintiff admits in his own deposition, Your Honor, that he never did ask for an application and the process never went forward.

THE COURT: Did Banda oppose Sabir's application?

MR. CLARK: Yes, he did, Your Honor,

THE COURT; what evidence do you have to support that?

MR. CLARK: His affidavit which says that he told her the same thing that he would not —— in paragraph 27 of his affidavit which we've attached, Your Honor, Mr. Banda says that,

> "Ms. Sabir was informed of the identical planning department goals and objections as was the plaintiff as I described . . ."

earlier in the affidavit dealing with parking and traffic flow which were a concern for the amount of traffic that goes into a day care center.

"Ms, Sabir," in paragraph 28,

> "was strongly encouraged by the planning department to consider acquisition of the adjacent property in combining the two properties into a single parcel."

So the fact is, Your Honor., that the second applicant was treated the same as the first applicant. She pursued it, Mr. Reese didn't.

Also. I think of import is the fact that there was testimony from Ms . Peacock that there had been -an African American who submitted an application for a day care center in Southfield which was approved prior to Mr. Reese's application at the property on ten mile, Thank you. Your Honor .

THE COURT: Mr. Robertson, the affidavit by Mr. Banda indicates that he responded to the Sabir request in the exact same manner, that is, that you need the adjoining lot in order to get my blessing and in order to develop this, but that she, and apparently her lawyer, said, you know. "we're going to pursue it anyway," and your client chose not to pursue it anyway. So I don't know where the disparate treatment is.

ROBERTSON: If I may just respond to that one paint, Your Honor.

THE COURT: Sure.

MR. ROBERTSON: It's not exactly like

that. Hr. Reese indicated a willingness to try to acquire the property next door. I mean, first of all, if he needed it to comply with Mr. Banda's or the planning department's requirements, if he had to do it, he would do it.

And secondly, as the investor, it wasn't a bad thing for him to acquire an additional piece of property in Southfield. He's an investor, he buys property, so that's not something that he was totally against. But Banda indicated to Mr. Reese that he would supply the money from federal funds to demolish the building that was there. And when Reese came back to Banda and asked him about it, he said, "Well, I think I can swing the deal, but I got to have the money to tear the building down," and the additional property was an expensive -- an additional $25, $28,000, but he was willing to come up with that. And then Mr. Banda told him, "Well, no, can't do it now." So it seemed like every time he satisfied a requirement that Mr. Banda presented to him, something else happened. And at that point, after Banda having told him that he would fight this all the way, and this is testimony from the real estate agent as well as Mr. Reese, he had a timetable —— Mr. Reese had a timetable in terms of developing these properties in whatever municipality it was, Southfield, Oak Park, Detroit, wherever. And it was getting to be too expensive, so he backed out of it without even knowing the process. He was thinking that it was the money for the property next door.

THE COURT: All right. Anything further?

The Court has reviewed all of the pleadings and affidavits presented in support of the motion for summary judgment and in opposition of the motion for summary judgment Plaintiff in this case has a burden to

establish by a preponderance of the evidence that he was treated differently because of his race. He's offered testimony, his affidavit and deposition testimony that when he sought to develop the subject site for a day care center he was informed by Mr. Banda, and I believe Ms. Peacock, that the subject site did not have adequate parking, and that in order to develop that site as a day care center, it would be necessary to acquire the adjoining parcel. The evidence shows that Mr. Reese made efforts to acquire the adjoining parcel, but the cost of that adjoining parcel was so high that it would make the development of a day care center not economical and Mr. Reese chose not to pursue developing it. pursue seeking formal approval from the planning commission for the development of the day care center.

The evidence shows also that a subsequent applicant, Sabir, did get approval for the day care center on the subject site without acquiring the adjoining parcel.

There is also evidence in the record that I've seen that Mr. Reese disagreed with Mr. Banda as to whether or not there was adequate parking on the site itself without the need to acquire the adjoining piece.

In any event, the record shows, and there is no dispute at this point, that when Sabir applied, Mr. Banda, quote, treated her or him the same way, unquote, by indicating that to develop that site for a day care center it would be necessary to acquire the adjoining parcel. Applicant Sabir apparently decided that that site could be developed as a day care center and that approval of the municipality or planning commission could be obtained despite Mr. Banda's

views that the additional parcel was necessary and sabir proceeded and obtained approval.

There simply is no evidence in this record that Mr. Banda or Ms. Peacock treated Mr. Reese differently because of his race, The only facts we have are that Mr. Reese is African American. Sabir is Caucasian. Mr. Reese didn't develop the parcel, and Ms. Sabir did. And that is not enough to show that the reason why Mr. Reese never developed that parcel was because of his race.

The plaintiff has a much bigger burden than that. The plaintiff must produce some evidence from which a jury can determine by a preponderance of the evidence that the reason why Mr. Reese was treated the way he was because he's black, and there simply is no evidence in this Court's opinion to support it. There is no evidence that a non—black was treated differently or would have been treated differently by Mr. Banda, that is, a non—black who came there and expressed. an intent to develop that parcel for a day care center .

The evidence persuades this Court that Mr. Banda would indicate to any applicant, black or white, that in his judgment the parcel needed to have the adjoining parcel in order to get his blessing with respect to approval for the day care center. The court is therefore satisfied that there is no genuine issue of fact, and that the defendants' motion for summary judgment must be granted. The Court does hereby grant defendants' motion for summary judgment.

Will you prepare an order?

MR. CLARK: I will, Your Honor.

THE COURT:Obtain his approval on it as to form?

MR. CLARK:I will, Your Honor. Thank you very much.

(Proceeding concluded at 2:39 p.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above—entitled matter.

8/11/97
Marie Jedreski Metcalf, CSMR-3274

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 98-777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF SOUTHFIELD; NICK BANDA;
and KATHERINE PEACOCK,

Petitioners,

vs.

ROOSEVELT REESE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the Court of Appeals found that Defendants failed to proffer **any** legitimate nondiscriminatory reason for their actions, does the inquiry end obviating this Court's need to consider the application of *St. Mary's Honor Center v. Hicks*?

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CITATIONS OF OPINIONS AND ORDERS

The Defendants (Petitioners) failed to attach the entire Opinion of the United States Court of Appeals for the Sixth Circuit to their Appendix. The Defendants added a portion of their brief for writ of certiorari into the Court of Appeals Opinion. The Defendants also failed to attach the entire transcript of the decision of the United States District Court for the Eastern District of Michigan. The decision was made at the hearing of Defendants' Motion for Summary Judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Defendants failed to list the proper Michigan statutory provision involved in this case. The proper statutory provision involved is the Michigan's Elliott-Larsen Civil Rights Act, Michigan Compiled Laws 37.2302, *et seq.*, which provides in relevant part:

> Sec. 302. Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

Defendants also failed to provide this Court with the Michigan's Constitutional provision, pertaining to equal protection, Constitution of the State of Michigan, Article I, Section 2, which provides in relevant part:

> Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The remaining provisions involved in this case are accurately reflected in Defendants' petition.

STATEMENT OF THE CASE

This is a racial discrimination case. Plaintiff-Respondent, Roosevelt Reese, an African-American, is a successful developer of day care centers and foster care homes in the Metropolitan Detroit area. Mr. Reese had several day care centers in Detroit. In April of 1992, Mr. Reese identified a property in the City of Southfield which was well suited for a day care center. It had adequate parking and was appropriately zoned for usage as a day care center. Mr. Reese's real estate agent, Helen Harper, made an offer for the property. The offer was contingent upon the property being approved for use by the City of Southfield as a day care center. Seller accepted the offer.

Mr. Reese then went to the City of Southfield Planning Department to apply for use of the property. At the Planning Department counter, he asked the Caucasian clerk what was needed to open a day care center on property in the City of Southfield. Rather than giving Mr. Reese an application, the clerk called Defendant Katherine Peacock, an assistant planner, to talk with Mr. Reese. When Mr. Reese asked the same question to Ms. Peacock, also a Caucasian, she went to get the planning director, Defendant Nick Banda, also a Caucasian.

Reese asked the same question to Mr. Banda. Rather than giving Mr. Reese an application, Defendants Banda and Peacock set a meeting for the next week. In the interim, Peacock made a site visit. The meeting was attended by Mr. Reese, his daughter Linda Mathis who administers his centers, Banda and Peacock. Mr. Reese showed Banda and Peacock photographs of his successfully operating centers. Rather than giving Mr. Reese an application, Defendants insisted that in order to proceed, Mr. Reese must purchase the adjacent property. This would add about $28,000 to the cost. There was no way Banda would recommend approval absent Mr. Reese's acquisition of the adjacent property for parking. Banda promised to "fight it all the way." Banda informed Mr. Reese that there was federal money available to demolish the building. Mr. Reese and Mrs. Mathis left the meeting and set out to acquire the adjacent property as directed by Defendants.

After extended negotiations with the owner of the adjacent property, Mr. Reese reported by telephone to Banda that he could buy the property if the City would demolish the building. Banda then stated that the federal funds were not available. Mr. Reese's subsequent calls to Banda and Peacock went unanswered and unreturned.

Discouraged, Mr. Reese had his earnest money deposit refunded. The entire process had taken almost a year.

In 1995, Mr. Reese noticed that Sunrise Day Care Center had opened at the exact location he had sought to have approved. The adjacent property had not been acquired. Sunrise Day Care Center had gone through the entire approval process in six weeks, from start to finish. Sunrise Day Care Center is owned and operated by a Caucasian. Mr. Reese thereafter filed a seven count complaint against the City of Southfield, Nick Banda and Katherine Peacock for: 1) violation of his civil rights under

42 U.S.C. § 1983; 2) violation of 42 U.S.C. § 1981; 3) violation of 42 U.S.C. § 1985(3); 4) deprivation of equal protection under the Fourteenth Amendment of the United States Constitution and violation of Michigan Constitution 1963 Article 1, Section 2; 5) violation of Michigan Elliott-Larsen Civil Rights Act; 6) tortious interference with a contractual relationship, prospective business and/or economic advantage; and 7) conspiracy to tortiously interfere with Plaintiff's contractual relationship, prospective business and/or economic advantage.

Mr. Reese made a request for interrogatories and production of documents. Defendants filed evasive and unresponsive answers. In an effort to comply with FRCP 37(2)(a), Mr. Reese granted Defendants an extension to respond to his discovery requests by March 31, 1997. Defendants filed a motion for summary judgment on March 17, 1997, the last day to file motions.

Mr. Reese received Defendants' responses on April 1, 1997 and filed a response to Defendants' summary judgment motion on April 10, 1997. On April 22, 1997 a hearing was held on Defendants' motion and this Court granted Defendants' motion for summary judgment, dismissing the entire case. On May 30, 1997, an order was entered granting the Defendants' motion. On June 20, 1997, Mr. Reese timely filed his Notice of Appeal of the District Court's order.

On August 13, 1998, the Court of Appeals reversed the District Court's Order and remanded this case for further proceedings. The Court of Appeals held that:

1) the evidence proffered by Reese at the summary-judgment stage was sufficient to satisfy his burden under the *McDonnell Douglas* standard (Appendix, at pg. 1a);

2) Reese stated a prima facie case of discrimination (*Id.*, at pg. 9a);

3) the Defendants failed to provide a nondiscriminatory explanation for their failure to give Mr. Reese an application (*Id.*, at pg. 10a);

4) the intra-corporate conspiracy doctrine does not provide a basis for dismissing Reese's claim under 42 U.S.C. 1985 at the summary-judgment stage (*Id.*, at pg. 11a);

5) since Defendants provided incomplete and evasive responses to Reese's discovery requests relevant to the "custom or policy" inquiry, it would be unfair to say that there is no dispute as to an alleged custom or policy furthering discrimination in Southfield municipal agencies (*Id.*, at pg. 12a);

6) the qualified immunity doctrine outlined in *Harlow v. Fitzgerald* does not dispose of Reese's claims against Banda and Peacock; qualified immunity also does not extend to Reese's claims against Banda and Peacock in their individual capacities (*Id.*, at pg. 13a); and

7) Reese is free to pursue his counts of tortious interference with business relationships on remand (*Id.*, at pg. 14a).

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE DEFENDANTS MISSTATE THE HOLDING OF THE COURT OF APPEALS AND ALL CIRCUITS AGREE THAT WHERE THE DEFENDANTS FAIL TO PROFFER ANY LEGITIMATE NONDISCRIMINATORY REASON FOR THEIR ACTIONS, THE INQUIRY ENDS AND PLAINTIFF HAS SATISFIED HIS BURDEN TO DEFEAT SUMMARY JUDGMENT.

The Defendants (Petitioners) base their petition for writ of certiorari on their allegation of the inadequacy of the Court of Appeals holding that the Defendants' proffered reason for the challenged action is false. Defendants contend that the Plaintiff must do more to defeat summary judgment.

The Defendants misstate the holding of the Court of Appeals. Their argument is flawed. The Court of Appeals held that the Defendants failed to offer *any* legitimate nondiscriminatory reason for the challenged action.

The Court of Appeals applied the *McDonnell/Burdine* framework and determined that Plaintiff easily proved his prima facie case (Appendix, page 9a). The Defendants also concede that the Plaintiff has established his prima facie case (Petition for Writ of Certiorari, page 16). The next step was for the Defendants to offer a legitimate nondiscriminatory reason for their actions. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 1094-96, 67 L. Ed. 2d 207 (1981). If the defendants satisfied the requirement, the burden would shift to the plaintiff to prove that their reasons

are pretextual. However, ~~if~~ the Defendants failed to offer a legitimate nondiscriminatory reason for their actions, the inquiry ends and the plaintiff survives summary judgment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S. Ct. 1817, 1827-28, 36 L. Ed. 2d 668 (1973).

In the instant case, the Court of Appeals rejected Defendants' ambiguous nondiscriminatory explanation, holding that Defendant' attempted explanation was vacuous.

> **In short, it is not a "legitimate nondiscriminatory explanation" to say that Reese never filed a site plan application, when his theory of discrimination is that the city discriminated against him by failing to provide the application in the first place, despite his repeated requests for the necessary information.** (Appendix. pg. 10a) (Emphasis added).

By determining that the Defendants' attempted explanation comprised no explanation at all, the Court of Appeals, in essence, held that the Defendant's failed to satisfy their burden of production and the inquiry ended there for summary judgment purposes.

Because the Defendants failed to proffer *any* legitimate nondiscriminatory explanation for their actions, their motion for summary judgment would fail in any court in any circuit. All circuits agree that the defendants must respond to a plaintiff's prima facie case with a legitimate nondiscriminatory reason for their actions. *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997)

> *Under the McDonnell Douglas framework, if a plaintiff establishes a prima facie case, and the*

> *defendant employer proffers no nondiscriminatory reasons for the action, it is settled that the plaintiff wins judgment as a matter of law. Burdine, 450 U.S. at 253, 101 S. Ct. at 1093- 94. Hopefully, no one would suggest that in such a case the defendant might be entitled to a judgment as a matter of law.* Yet, those who argue against the Howard line of decisions are advocating a position that is not much more logically defensible than that. Given the establishment of a prima facie case in each, the case in which an employer puts forward nothing but false reasons is too analytically close to the case in which the employer puts forward no reasons for the law to permit judgment as a matter of law to be entered for opposite sides in the two cases. Stated somewhat differently, why should the law reward so handsomely mendacity in legal proceedings? (*Combs*, 106 F.3d at 1537, emphasis added).

The Defendants argument for a writ of certiorari is that clarification is needed as to whether a plaintiff satisfies his burden of defeating summary judgment by establishing that the proffered reason for the challenged action is false.

First, the Defendants' argument assumes that they have met their burden of production. The Court of Appeals held they did not. The inquiry ends and there is no reason for this Court to evaluate this case according to the Defendants' argument. No clarification is needed when a defendant fails to satisfy its burden of production. The law is clear that when such is the case, coupled with plaintiff's proof of a prima facie case, the plaintiff defeats summary judgment. (*See Combs v. Meadowcraft, Inc.*, 106 F.3d 1519, 1537 (11th Cir. 1997); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

Secondly, it is settled law that when the plaintiff has discredited the defendant's proffered reason, summary judgment is improper. *Barbour v. Merrill*, 310 U.S. App. D.C. 419, 48 F.3d 1270 (D.C. Cir.), *cert. granted in part*, 116 S. Ct. 805 (1996), *cert. dismissed*, 116 S. Ct. 1037 (1996); *Kolstad v. American Dental Association*, 108 F.3d 1431 (D.C. Cir. 1997), *rehearing in part granted on other grounds*, (May 28, 1997) (Nos. 96-7030, 96-7047) (a factfinder may infer discrimination based upon the combination of the plaintiff's prima facie case and the plaintiff's presentation of evidence sufficient to "discredit" the employer's proffered nondiscriminatory reasons for its challenged action, and concluded that, under Hicks, a defendant's motion for judgment as a matter of law must not be granted when the plaintiff has presented such evidence.); *Kolstad,* 108 F.3d at 1436-37 (*quoting Barbour,* 48 F.3d at 1277). *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997) ("Based on the Supreme Court's clear statement in the majority opinion in Hicks, read together with the rationale of the dissenting justices, we understand the Hicks Court to have been unanimous that disbelief of the defendant's proffered reasons, together with the prima facie case, is sufficient circumstantial evidence to support a finding of discrimination. Therefore, it follows from Hicks that a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action."); *Sheridan v. E.I. DuPont de Nemours and Co.,* 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc), petition for cert. filed*, 65 U.S.L.W. 3571 (U.S. Feb. 3, 1997) (No. 96-1231) ("[A] plaintiff may survive summary judgment . . . if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action."); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("If the plaintiff succeeds in

showing a prima facie case and presents evidence that the defendant's proffered reason for the employment decision was pretextual — *i.e.*, unworthy of belief, the plaintiff . . . is entitled to go to trial."); *Perdomo v. Browner*, 67 F.3d 140, 145 (7th Cir. 1995) ("Because a fact-finder may infer intentional discrimination from an employer's untruthfulness, evidence that calls truthfulness into question precludes a summary judgment."); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (vacating a grant of judgment as a matter of law to the defendant, on the ground that the plaintiff had presented sufficient evidence to permit a reasonable factfinder to "reject [the] defendant's proffered reasons for [the] challenged employment action and thus [to make] the ultimate inference of discrimination."); *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) (*quoting Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (8th Cir.), *cert. denied*, 513 U.S. 946, 130 L. Ed. 2d 310, 115 S. Ct. 355 (1994)); *Gaworski*, 17 F.3d at 1110 ("The elements of the plaintiff's prima facie case are . . . present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations. The 'ultimate question' of discrimination must therefore be left to the trier of fact to decide."); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (noting that a defendant in an employment discrimination case can obtain summary judgment "in one of two ways. He can demonstrate that the plaintiff's proffered evidence fails to establish a prima facie case, or, if it does, the defendant can present evidence that provides a legitimate nondiscriminatory explanation about which the plaintiff does not create a factual dispute.") (emphasis added); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed."); *Sheridan*, 100 F.3d at

1068 (stating that the position taken by the Equal Employment Opportunity Commission ("EEOC") as amicus curiae comported with its holding).

Defendants have no real basis for their petition for writ of certiorari.

The *Hicks* Court held that, under the proper understanding of the *McDonnell Douglas* framework,

> the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993).

Thus, the Supreme Court established that, when presented with sufficient evidence to find both that the plaintiff has made a *prima facie* case and that the employer's proffered nondiscriminatory reasons for the challenged actions were not credible, the factfinder can properly find that the defendant employer has intentionally discriminated against the plaintiff. The Court repeated this principle twice more in the sentence following the one quoted above, saying: "Rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination," and: "Upon such rejection, no additional proof of discrimination is required," *id.* (footnote, citation, and internal quotation marks omitted), and then once more in a footnote: "Rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination. . . ." (*Id.*, at 511, n.4.)

Finally, as the Court stated in *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997):

> The upshot of *Hicks* and the *Howard* line of decisions is that a defendant cannot win judgment as a matter of law merely by proffering nothing but false nondiscriminatory reasons for its actions. The justification for that rule is closely analogous to the justification for the mandatory presumption of discrimination that initially accompanies a plaintiff's prima facie case. As then-Justice (now Chief Justice) Rehnquist pointed out long before the Hicks decision, we require a defendant, on pain of losing the case, to come forward with explanations for its actions once a plaintiff has made out a prima facie case of discrimination, "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949-50, 57 L. Ed. 2d 957 (1978). Justice Rehnquist further explained:
>
> "[W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race."

Combs v. Meadowcraft, Inc., 106 F.3d 1519, 1537 (11th Cir. 1997) (*citing to Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949-50, 57 L. Ed. 2d 957 (1978)).

II.

THE COURT OF APPEALS PROPERLY REVIEWED THIS CASE *DE NOVO* AND CORRECTLY REVERSED THE DISTRICT COURT'S HOLDING WHERE THE DISTRICT COURT FAILED TO APPLY THE PROPER STANDARD OF REVIEW BY REQUIRING THE PLAINTIFF TO PRODUCE DIRECT EVIDENCE OF DISCRIMINATION.

This case was initially dismissed by the Court on Defendants' motion for summary judgment. The Court of Appeals reviews the District Court's grant of summary judgment *de novo*. The appellate court is required to apply the same test the district court should have utilized initially. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir. 1987).

In the instant case, the District Court failed to apply the proper standard and instead, required the Plaintiff to provide direct evidence of discrimination. (*See* Court of Appeals Opinion, at Appendix, pg. 6a: "The transcript of the hearing makes clear that the district court was troubled by Reese's failure to introduce any direct evidence that Sabir was treated differently or more favorably than Reese. . . .")

The Court of Appeals found the District Court erred and then proceeded to review this case pursuant to the burden-shifting proof scheme in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*See* Court of Appeals Opinion, at Appendix, pg. 7a-10a).

Again, as more fully discussed above, the Defendants misstate the Court of Appeals holding. The Court of Appeals held that the Defendants failed to provide a legitimate nondiscriminatory reason for their actions, and as such, failed to satisfy their burden of production:

> Because the defendants have provided no other legitimate, nondiscriminatory explanation for why Reese was not given an application when Sabir was able to obtain one with relative ease, Reese is entitled to present his full case to a trier of fact.
>
> [FN2] In so holding, we express no opinion at to the actual merits of Reese's case . . . We merely hold that given the state of the record in this case, the question of what really happened to Reese must be resolved by the trier of fact. (Court of Appeals Opinion, Appendix, pg. 10a)

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari and affirm the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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